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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 16, 2002

APPLICATION OF

TENASKA VIRGINIA PARTNERS, L.P. CASE NO. PUE010039

For approval of a certificate of public convenience and necessity pursuant to Virginia Code § 56-265.2, an exemption from Chapter 10 of Title 56, and interim approval to make financial commitments and undertake preliminary construction work

ORDER

On January 16, 2001, Tenaska Virginia Partners, L.P., ("Tenaska" or "Applicant") filed an Application for approval of a certificate of public convenience and necessity pursuant to § 56-265.2 of Chapter 10.1 of Title 56 of the Code of Virginia ("Code") to construct and operate a 900 MW natural gas-fired electric generating facility in Fluvanna County, Virginia. Tenaska requested an exemption from the provisions of Chapter 10 of the Code (§§ 56-232, *et seq*.). The Applicant also requested interim authority under § 56-234.3 of the Code to allow it to make financial expenditures and undertake preliminary construction work. On April 20, 2001, the Applicant filed additional information necessary for the Commission's environmental assessment of the proposed facility.

On May 4, 2001, the Commission entered an Order for Notice and Hearing providing an opportunity for interested persons to file comments, directing Staff to investigate the Application, and setting a hearing in this matter. The evidentiary hearing was held on July 24, 2001, before Hearing Examiner Michael D. Thomas. Richard D. Gary, Esquire, and John M. Holloway, III, Esquire, appeared on behalf of Tenaska. C. Meade Browder, Jr., Esquire, and

Kara Austin Hart, Esquire, appeared on behalf of the Commission's Divisions of Energy Regulation and Economics and Finance ("Staff"). Kodwo Ghartey-Tagoe, Esquire, appeared on behalf of Columbia Gas of Virginia, Inc. ("Columbia Gas"). Eight public witnesses testified at the hearing.

Tenaska is a limited partnership that plans to construct and operate the generating facility ("Facility") but will not sell the electricity generated by the Facility at retail. The Applicant proposed to enter into a contract or tolling agreement with a wholesale power purchaser that would sell the output or would transfer the output through an energy conversion services arrangement to a marketing entity not affiliated with Tenaska or its general partner, Tenaska Virginia, Inc. The Applicant states that it plans to start construction in the spring of 2002 and commence commercial operation in the summer of 2004.

In support of its request to be exempted from regulation under Chapter 10, the Applicant states that it will build and operate the proposed Facility but will not sell the Facility's output at retail. Moreover, the Applicant stated, no incumbent electric utility has a financial or ownership interest in the Facility, so no portion of the cost of the proposed Facility will be included in the rate base of any utility subject to regulation under Chapter 10. Thus, the sale of the Facility's output will be subject to the Federal Energy Regulatory Commission's ("FERC's") jurisdiction, not this Commission's.

Tenaska must also obtain a number of other regulatory approvals before it can commence construction. It filed an application for a Special Use Permit ("SUP") with the Fluvanna County Board of Supervisors ("Board of Supervisors"). The SUP was approved by the Board of Supervisors with 34 conditions on November 16, 2000. The Applicant also submitted a Prevention of Significant Deterioration ("PSD") program application with the Department of

Environmental Quality ("DEQ") in September of 2000, which was supplemented in October 2000, in order to obtain an air permit.

Tenaska's air quality witness testified that Fluvanna County is in attainment of each of the National Ambient Air Quality Standards ("NAAQS") criteria pollutants, including nitrogen oxides ("NO_x") and sulfur dioxide ("SO_2"). He stated that Tenaska's air quality modeling analysis showed that the Facility, emitting at its maximum potential emissions rate, will not have a significant impact on air quality. He further testified that, in his opinion, federal programs, such as the new ozone standards promulgated by the U.S. Environmental Protection Agency ("EPA") that will impose a new NO_x emissions cap, will do more to address regional air quality issues. He stated that the new emissions cap will apply to the operation of the Facility. He added that emissions of sulfur dioxide and particulate matter ("PM") will be minimized through the use of combustion controls.

The Piedmont Environmental Council ("PEC") filed comments prior to the hearing. The PEC states that it is a not-for-profit land conservation and planning organization having membership throughout central Virginia, including the areas directly affected by the Facility. The PEC advocated an assessment of the Facility's impacts on the local community and quality of life, water supply, water quality, and air quality. The PEC stated that there are already eight other power plants either existing or planned that are or will be near the Facility, and, collectively, these plants could have a significant impact on the region's air quality that would not be predicted under the PSD permitting process. The PEC concluded that it would be premature and contrary to the public interest for the Commission to approve Tenaska's

application in the absence of an assessment of the cumulative impact of these facilities on air quality in the region.[1]

On October 23, 2001, Hearing Examiner Michael D. Thomas entered his Report in which he summarized the record.[2] The Report reviews and analyzes the evidence and issues in this proceeding. We will primarily address three matters: (i) the impact of the Facility on the rates for customers of regulated utility service; (ii) the Hearing Examiner's recommendation that the Facility not be allowed to burn low sulfur fuel oil as an alternative fuel; and (iii) the cumulative environmental impact of the Facility and other existing as well as proposed plants on the region's air quality.

First, the Hearing Examiner concluded that the Facility will have no material adverse effect upon the rates paid by customers of any regulated utility in the Commonwealth. It is not clear if the Hearing Examiner considered the impact of the Facility on all regulated public utilities or just electric public utilities.

The Hearing Examiner also discussed the issues surrounding the Applicant's proposal to burn fuel oil for no more than 720 hours per year, from October through March. He summarized the public witnesses' concerns and his own about the potential impacts of using fuel oil, as further discussed below. The Hearing Examiner found that Tenaska had not articulated well its need to burn fuel oil as a back-up fuel. He observed that by prohibiting the use of such fuel, the Facility's most harmful emissions would be measurably reduced. The Examiner recommended that the Applicant's proposed use of fuel oil be prohibited in any certificate that may be granted.

[1] The PEC currently is in litigation with the Board of Supervisors and Tenaska over land use and zoning decisions made by the Board of Supervisors to permit the location and construction of the Facility.

[2] Report of Michael D. Thomas, Hearing Examiner, Case No. PUE010039, Doc. Con. Ctr. No. 011030022 (Oct. 23, 2001) ("Report").

Turning to the Hearing Examiner's discussion of the Facility's impact on air quality, the Hearing Examiner summarized the testimony of public witnesses who are extremely concerned about the Facility's potential negative impact on the air quality in their community.[3] He stated that Tenaska's environmental witness testified that its air quality modeling techniques had been approved by the DEQ and the EPA, and indicated that the Facility's impact on the air quality will be below applicable federal and state health standards. The Hearing Examiner observed that the DEQ's air quality witness supported the Applicant's case in stating that Tenaska's modeling showed that the Facility's impact on air quality would be *de minimis*.

The Hearing Examiner was concerned about the adequacy of the air quality analysis required by the PSD program. The Examiner identified and discussed two areas that he believes are missing from the DEQ's current air quality analysis, areas that if included could provide a better assessment of the Facility's impact on air quality. The first area is the failure of the analysis to take into account the existing air quality, not including the proposed facility. The second area is the failure of the air quality analysis to take into consideration other pollution sources in the surrounding area, including other proposed generating facilities. The Hearing Examiner stated that as long as applicants for air permits model beneath the significance levels, the analysis ignores incremental increases in the overall level of pollutants in the air. He recommended that the Commission direct its Staff to discuss with the DEQ possible enhancements in the air quality analysis used for major stationary pollutant sources and address them in the next application for a generating facility to come before the Commission.

[3] Report at 2-6.

Comments on the Hearing Examiner's Report were filed by Tenaska and Columbia Gas of Virginia ("Columbia"). Staff submitted the comments of the DEQ. In addition, ten written comments or letters were filed by others.[4]

In its Comments, Tenaska states that, for the most part, it believes the Hearing Examiner made his findings and recommendations based on the record and the law. The Applicant believes, however, that on certain points the Hearing Examiner's recommendations are contrary to the record and the law, and are arbitrary and capricious. Specifically, Tenaska takes exception to the Hearing Examiner's recommendation that the Commission prohibit the use of low sulfur oil as a back-up fuel; the Examiner's concerns about Tenaska's use of a reservoir or other back-up water source during drought conditions; the Examiner's recommendation that certain conditions should be included in the emergency management plan; and his recommendation that the Commission impose certain conditions relating to the possibility of clear-cutting trees in the buffer surrounding the proposed site.

First, Tenaska objects to the recommendation that the use of fuel oil be prohibited, arguing that the Commission's adoption of the Hearing Examiner's recommendations would: (i) negatively impact the Facility's reliability; (ii) place the Facility at a competitive disadvantage; (iii) undermine the General Assembly's goal of advancing retail competition; (iv) ignore evidence showing that the Facility will not have a significant impact on the environment; and (v) usurp the DEQ's authority to evaluate and determine the impact of proposed plants on air emissions.

[4] These persons or entities are: John E. Rueckert; Catherine E. Neelley; Elizabeth Ellis; Jim and Annie Christmas; Paul P. Gallagher; William E. Damon, Jr., of the U.S. Department of Agriculture, Forest Service; Delegate Watkins M. Abbitt, Jr.; Kat Imhoff, Chief Operating Officer of Monticello; the Board of Supervisors; and Dynegy.

Tenaska also objects to the Hearing Examiner's recommendation that the Commission prohibit it from using water from any source other than the James River until Tenaska clarifies its position on water usage and its impact on the environment. Tenaska contends that Commission involvement in this matter is unnecessary and counterproductive. Tenaska states that such a prohibition could preclude it from obtaining auxiliary water supply from surface or underground water sources lawfully available to it.

Tenaska further objects to the Hearing Examiner's recommendation that the Commission should approve the Facility conditioned upon Tenaska's inclusion of procedures for contacting off-duty plant personnel in its emergency management plan and a requirement that it provide annual emergency response training for county emergency management personnel. Tenaska contends that this recommendation would usurp the Board of Supervisors' authority concerning emergency response issues in Fluvanna County.

Finally, Tenaska objects to the Hearing Examiner's recommendation that the Commission impose a prohibition on clear-cutting and his suggestion as to how tree thinning should be conducted. Tenaska responds that the recommendation would put restrictions on the forestry management plan before Tenaska has an opportunity to consult with forestry experts.

On behalf of the Board of Supervisors, the Fluvanna County Administrator sent a letter to the Commission stating he wished to acknowledge and respond to the Hearing Examiner's Report. The County Administrator stated that the Board of Supervisors was surprised by some of the Hearing Examiner's recommendations, particularly regarding the Applicant's proposed use of low sulfur oil as a back-up fuel. The County Administrator stated that he realizes it may not be feasible for the Hearing Examiner to review information that has not been submitted to the Commission, but he has found no evidence indicating that the Hearing Examiner attempted to

contact the County concerning these matters. He added that he was even more surprised to find few indications that the Commission's Staff had reviewed and appropriately considered the extensive work of the DEQ Air Quality Division's analysis of the use of fuel oil.

The County Administrator summarized a list of the measures undertaken by the Board of Supervisors beginning in the summer of 2000, even before the plant was announced. This list included: (i) the Board of Supervisors' trip to Seattle, Washington, in August 2001, to visit a plant similar to the Facility, where they met with local and State government officials who were knowledgeable about that plant; (ii) a trip by five County officials, including members of the Planning Commission and the Board of Supervisors, who traveled to Fredericksburg in August of 2000, to attend a meeting with three DEQ Air Quality officials to discuss in detail the standards and process required for maintaining air quality; (iii) the County's retention of an independent consultant to investigate numerous considerations about the project, including air quality and traffic impact; and (iv) the imposition of 34 conditions on the SUP to ensure that all reasonable efforts would be made to protect the public, the County, and the Commonwealth.

Additionally, the County Administrator pointed out that it is expected that fuel oil would be used only 48 to 96 hours per year because the high grade, low sulfur fuel oil that the Applicant proposes to use will be considerably more expensive than natural gas. Given the low volume of truck traffic on the roads around the Facility and the Virginia Department of Transportation's ("VDOT's") ability to route the trucks, the Board of Supervisors estimated that the truck traffic would amount to perhaps 25 or 35 trucks per month. According to the County Administrator, the Board of Supervisors is convinced that the truck traffic will be manageable and not pose a significant problem. The County Administrator stated that the Hearing

Examiner's Report appears to be full of sweeping generalizations and conclusions that have not been checked against the facts or the analyses of state and local officials.

Staff filed comments that were provided by the DEQ. The DEQ states that it appears the Hearing Examiner may have misinterpreted some of the testimony, and it is concerned about many of the Examiner's assertions. The DEQ commented that if the Commission has concerns about the appropriateness of its or the EPA's policies on the protection of air quality, there are other forums more appropriate than the review of an individual application.[5]

Dynegy filed a Response to the Hearing Examiner's Report, along with a request for leave to file its Response, stating that it accepts the record as it has been developed prior to the filing of Dynegy's Response. Alternatively, Dynegy requests that it be permitted to participate as a party. Dynegy is the only non-party entity that filed a formal request that its comments on the Hearing Examiner's Report be considered. We will consider Dynegy's comments and the comments filed by others, including the DEQ and the Fluvanna County Board of Supervisors.

Dynegy strongly opposes the Hearing Examiner's recommendations concerning the air quality analysis. Dynegy contends that the Commission should not expand the scope or nature of its environmental review. Dynegy maintains that if the Hearing Examiner's recommendations are adopted, "the approval of construction of generation capacity would be impeded, and developers would face a new and uncertain regulatory landscape with additional layers of complex, questionable, and inconsistent environmental analyses by two institutions of state government."[6] Dynegy asserts that the Commission's environmental analysis should be based on

[5] Although DEQ was not a "party," we will consider their comments. The DEQ's comments are discussed in greater detail in our analysis below.
[6] Dynegy Comments at 7.

responsible environmental stewardship, and it will fulfill that role by receiving and giving due consideration to all reports from state agencies concerned with environmental protection.

Dynegy also opposed the Hearing Examiner's recommendation that the use of low-sulfur oil as a back-up fuel be prohibited. It contends that the issue should be left to the state authorities and local government entities that have expertise in that matter. Dynegy argues that the Commission should not substitute its judgment for those of the Board of Supervisors, that approved a SUP that allows Tenaska to use fuel oil for no more than 720 hours per year, and VDOT, both of which, according to Dynegy, are satisfied that the tanker truck traffic does not present a condition sufficient to prohibit or restrict the delivery of fuel oil.

Columbia filed Comments stating that it holds certificates to provide natural gas service in Fluvanna County, including the area where Tenaska proposed to build the Facility. Columbia explains that its interest in this case is to ensure that any gas lateral line or piping that is constructed to supply natural gas to the Facility is properly certificated under Virginia law. Columbia states that it entered into a Stipulation with Tenaska and the Commission Staff regarding the certification of the Facility, including plant piping. Columbia states that Transcontinental Gas Pipeline Corp. ("Transco") will construct, own, and operate a lateral gas pipeline necessary for the provision of natural gas to the Facility. Further, the Stipulation makes clear that the gas lateral necessary to service the plant is to be constructed by Transco, not Tenaska. Columbia represents that the parties to the Stipulation believe that the Stipulation results in a fair and reasonable resolution of Columbia's concerns.

NOW THE COMMISSION, having considered the record, the Hearing Examiner's Report, the comments and letters filed in response thereto, and the applicable law, is of the opinion and finds that the case must be remanded to the Hearing Examiner for further

proceedings in several areas. We ask him to develop the record further on these issues and to make recommendations.

The law establishing the criteria and bases for our decision in this case is found in several statutes, §§ 56-265.2 B, 56-580 D, 56-46.1 and 56-596 A of the Code. Sections 56-265.2 B and 56-580 D are similar; § 56-580 D is designed to supercede § 56-265.2 B after January 1, 2002.[7] Both sections apply in this case, and their provisions overlap to a large extent. Section 56-265.2 B provides that the Commission:

> [M]ay permit the construction and operation of electrical generating facilities, which shall not be included in the rate base of any regulated utility whose rates are established pursuant to Chapter 10 (§ 56-232 et seq.) of this title, upon a finding that such generating facility and associated facilities including transmission lines and equipment (i) will have no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth; (ii) will have no material adverse effect upon reliability of electric service provided by any such regulated public utility; and (iii) are not otherwise contrary to the public interest. In review of its petition for a certificate to construct and operate a generating facility described in this subsection, the Commission shall give consideration to the effect of the facility and associated facilities, including transmission lines and equipment, on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact as provided in § 56-46.1.

Similarly, § 56-580 D states:

> The Commission may permit the construction and operation of electrical generating facilities upon a finding that such generating facility and associated facilities including transmission lines and equipment (i) will have no material adverse effect upon reliability of electric service provided by any regulated public utility and (ii) are not otherwise contrary to the public interest. In review of its petition for a certificate to construct and operate a generating

[7] The Commission determined that the Virginia Electric Utility Restructuring Act ("Act") operates so that the provisions of the Act relating to generation supplant §§ 56-234.3 and 56-265.2 B of the Code on and after January 1, 2002. *See Commonwealth of Virginia, ex rel. State Corporation Comm'n, Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities*, Case No. PUE010313, Doc. Con. Ctr. No. 010810174 (Order Aug. 3, 2001) at 3, 5-6.

> facility described in this subsection, the Commission shall give consideration to the effect of the facility and associated facilities, including transmission lines and equipment, on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact as provided in § 56-46.1.

Both sections incorporate and refer to § 56-46.1. Section 56-46.1 states that, in reviewing an application for "any electrical utility facility," the Commission:

> [S]hall give consideration to the effect of that facility on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact. In such proceedings it shall receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection; and if requested by any county or municipality in which the facility is proposed to be built, to local comprehensive plans that have been adopted pursuant to Article 3 (§ 15.2-2223 et seq.) of Chapter 22 of Title 15.2. Additionally, the Commission (i) may consider the effect of the proposed facility on economic development within the Commonwealth and (ii) shall consider any improvements in service reliability that may result from the construction of such facility.

Under § 56-46.1, the Commission:

(a) shall consider the impact of the facility on the environment.

(b) shall establish conditions that may be desirable or necessary to minimize any adverse environmental impacts resulting from the facility.

(c) shall receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection, and, if requested by any county or municipality in which the facility is proposed to be built, to local comprehensive plans that have been adopted pursuant to Article 3 (§ 15.2-2223 et seq.) of Chapter 22 of Title 15.2.

(d) shall consider any improvements in service reliability that may result from the construction of such facility.

(e) may consider the effect of the proposed facility on economic development within the Commonwealth.

In addition, § 56-596 A sets forth additional criteria that the Commission is required to consider in matters relating to the provisions of the Act, including the review of petitions for approval to construct and operate electric generating facilities. Specifically, that section states

that: "In all relevant proceedings pursuant to this Act, the Commission shall take into consideration, among other things, the goals of advancement of competition and economic development in the Commonwealth."

The Code thus establishes criteria and requires findings in a number of areas.

Reliability: To approve the construction and operation of an electrical generating facility, the Commission must find that the proposed facility and associated facilities will have no material adverse effect upon reliability of electric service provided by any regulated public utility.[8] In determining whether to approve the facility, the Commission shall also consider any improvements in service reliability that may result from construction of the proposed facility.[9]

Competition: The Commission must take into consideration the goal of the advancement of competition in the Commonwealth.[10]

Rates: The Commission must find that the proposed generating facility and associated facilities will have no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth.[11]

Environment: In determining whether to approve the construction and operation of an electric generating facility, the Commission shall consider the effect of the facility and associated facilities on the environment. If the Commission approves construction and operation of the facility, the Commission shall establish such conditions as may be desirable or necessary to minimize adverse environmental impact.[12]

[8] Sections 56-265.2 B(ii) and 56-580 D(i).
[9] Section 56-46.1 A.
[10] Section 56-596 A.
[11] Section 56-265 B 2(i).
[12] Sections 56-265.2 B, 56-580 D, and 56-46.1 A.

Economic Development: The Commission "may" consider the effect of the proposed facility on economic development; the Commission, however, shall take into consideration the goal of the advancement of economic development in the Commonwealth.[13]

Public Interest: Both §§ 56-265.2 B and 56-580 D require a finding that the proposed facility and associated facilities "are not otherwise contrary to the public interest."

Below, we will review each area of consideration in analyzing Tenaska's proposal.

Reliability

There is ample evidence that the Tenaska plant and associated facilities should have no material adverse effect upon reliability of electric service provided by any regulated public utility.[14] We agree with the Hearing Examiner and can make such a finding as required by § 56-265.2 B(ii) and 56-580 D(i). In addition, under § 56-46.1, we are required to consider any improvements in service reliability that may result from construction of the project. While this project should not harm reliability, there is little evidence that it will necessarily help service reliability in Virginia to any significant extent. Tenaska has not yet entered into a contract or a tolling agreement pursuant to which it will sell its output. The Company states that it will do so once it has received all necessary regulatory approvals. If the output is sold on a firm basis to an out-of-state buyer, then the facility may not provide significantly increased reliability in a time of shortage. In such a situation, if there is insufficient electricity to supply both the Virginia load and the out-of-state buyer such that a blackout is required either for the buyer or Virginia consumers, the transmission operator could well require blackouts in Virginia so that the electricity could be delivered to the out-of-state buyer who paid for it. At other times, when there is no shortage or a less severe shortage, the plant would provide improvement to service

[13] Sections 56-46.1 and 56-596 A.
[14] Report at 32.

reliability. Thus, while the plant generally will be a plus for reliability, depending on transmission rules, it may not help in a time of shortage when it may be needed the most.

Competition

We are required by § 56-596 A of the Code to consider, in our deliberation, the goal of advancement of competition in the Commonwealth. This plant will, we understand, sell its output into the wholesale market. As Staff noted, because the capacity will not be controlled by the incumbent utility, the proposed facility should help develop wholesale competition in the region which, in turn, should help advance the goal of competition in the Commonwealth.

Rates

The Hearing Examiner found that the facility will have no material adverse effect upon the rates paid by customers of any regulated utility in the Commonwealth, as required by § 56-265.2 B(i) of the Code. Section 56-265.2 B(i) of the Code is broad and covers not only electric utilities, but "the rates paid by customers of any regulated public utility in the Commonwealth." Thus, impacts on customers of other utilities are included. We agree with the Hearing Examiner with respect to rates for electric service; nothing in the record indicates that incumbent electric utilities' rates would be impacted by the Facility's operation.

It is not clear, however, whether the Hearing Examiner considered the Facility's impact on regulated public utilities other than electric utilities. There was no discussion of whether, because of the amount of natural gas the Facility will use, the Facility could influence the price and/or availability of natural gas or transportation capacity for natural gas. Given that the Examiner did not discuss this issue, we will remand this case and ask that the Examiner develop the record and make findings and recommendations on these matters with respect to other

utilities such as gas and water. We note that these and similar matters may also be considered as part of the public interest finding we must make under § 56-580 D(ii) of the Code.[15]

The Environment

One of the areas of our greatest concern in this case is the environment. As discussed above, the law requires us to consider the impact of a proposed facility on the environment in determining whether to approve its construction and operation. Specifically, we are required by Code §§ 56-46.1, 56-265.2 B, and 56-580 D to consider the potential impact of a proposed facility and any associated facilities on the environment. Additionally, we are required by § 56-46.1 of the Code to receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection.

Changes in circumstances and in the law in recent years require that we review our approval of the construction and operation of new generating facilities. In the past, the Commission reviewed demand forecasts to determine whether new generation capacity was needed; considered alternative responses; examined the choice of technology and fuel source; considered the impact of a proposed facility on the environment; determined if the location on the utility's transmission grid was appropriate and efficient; and studied cost estimates and construction plans for reasonableness. The reviews and analyses were generally conducted in the context of a single utility's system.

A proposed facility was considered in conjunction with other plants owned by the applicant in the surrounding franchise area or, if near the boundary of that territory, with nearby facilities of a neighboring utility. Most often, proposed facilities were considered one at a time. It was unnecessary to consider the cumulative effect of a number of proposed plants because the

[15] *See* 20 VAC 5-20-14.

regulated entity constructed almost all such plants and applications for new facilities were spread over many years. Now that has changed.

Most of the current applications for approval of proposed generating facilities are filed not by utilities but by independent power producers ("IPPs"). Currently, the Commission has pending eleven applications totaling almost 8,000 MW of proposed new capacity. These facilities are part of more than two dozen announced proposals that could total more than 15,000 MW.[16] Further, more new proposals are being announced on a regular basis. These proposed new plants, should they all be built, could significantly increase Virginia's total capacity, which is currently approximately 20,000 MW. These IPP projects are presented as merchant plants that intend to sell their output in the wholesale market. They are not part of an integrated utility system, but, instead are individual units.

In analyzing these applications, the Commission, in accordance with §§ 56-265.2 B and 56-580 D of the Code, no longer considers whether there is a need for the facilities in the Commonwealth. In the past we evaluated utility applications to construct generating facilities by examining the degree of need for the facility, analyzing the impact of failing to meet that need, and then reviewing alternative responses. Unless a need for the plant could be shown, it could not be approved. With need no longer a factor in our decision, the scale upon which we balance our decisions has changed. For example, we no longer are able to balance some degradation of the environment with an overriding need for the power from a new generating facility. At the same time, competition and economic development are now goals we must consider. We also need to examine whether we should evaluate proposed facilities individually, in isolation, or consider the cumulative impact of other proposed units as we consider each application. In

[16] If utility plants and approved, under construction and recently completed plants are included, the number of plants increases to more than 30 and their combined capacity exceeds 20,000 MW.

essence, the removal of need as a criterion makes our decisions whether to grant approvals more difficult because the most compelling benefit of a proposed plant, the need for Virginia citizens for electricity, has been removed from the balance.

What was once a relatively simple, systematic, and comprehensive approach to approving the construction of generating facilities in Virginia must be reexamined in light of fundamental changes in federal and state law and their impact on the electric power industry.

The spiraling number of applications filed to construct merchant plants is not a phenomenon unique to Virginia. FERC's efforts in recent years to develop competition in bulk power markets have stimulated non-utility generators to enter the field of power production. As such, a number of states, including Virginia, have been inundated with applications to build merchant power plants. To date, the number of proposed plants throughout the nation would add approximately 368,000 MW to the country's electrical generating capacity.[17]

The dramatic increase in proposed new power plants in Virginia has created concerns about the cumulative impact of these proposed facilities. These concerns have been expressed not only in this proceeding, but elsewhere as well. Moreover, those expressing concern include not only environmental and health interests, but businesses and generators as well. In an order issued on December 14, 2001, in Case Nos. PUE010313 and PUE010665, we discuss and review these concerns in some detail, as well as the responses of other areas of the country to similar concerns.[18] In Case No. PUE010665, we proposed for consideration new rules that could

[17] Electric Power Supply Association, Announced Merchant Plants, October 26, 2001.

[18] *See Commonwealth of Virginia, ex rel. State Corporation Comm'n, Ex Parte: In the matter of amending filing requirements for applications to construct and operate electric generating facilities*, Case No. PUE010313, Doc. Con. Ctr. No. 011220335 (Order Adopting Rules and Prescribing Additional Notice Dec. 14, 2001) ("Rules for IPP Filing Requirements") at 7-13.

require that a cumulative impact analysis be filed with applications for Commission approval for the construction and operation of new power plants.

The Hearing Examiner in this proceeding recommended approval of the certificate despite his concern that there had been no analyses of the impact of the proposed facility and other proposed facilities on the existing air quality in the area that would be affected by the Tenaska Facility. The DEQ's required analysis, instead, was based on modeling that showed that the Tenaska Facility alone would not exceed predetermined "significance" levels for any of the criteria pollutants. As discussed, the Hearing Examiner identified two primary areas of concern.

First, the Hearing Examiner stated that there is nothing in the record that addresses the current air quality in the community and other nearby areas that might be impacted by the Facility's emissions.[19] The Hearing Examiner noted that the stated goal of the PSD permitting process is to prevent significant deterioration of air quality; however, under the PSD program it appears that slight incremental increases in pollution are acceptable. He queries how, if a community's existing air quality is not known and included in the air quality analysis, the DEQ can know when an area reaches nonattainment until it is already too late to do anything?

The second concern, which goes hand in glove with the first, involves cumulative increases in air pollution in the region. The Hearing Examiner stated that the air quality analysis ignores incremental increases in the overall level of pollutants. He points out that, at some point, the emissions of existing and proposed plants, which were insignificant for each plant in its individual analysis, will in all likelihood have a much more significant impact collectively on the area's air quality. The Hearing Examiner reasoned that since the air quality analysis ignores

[19] The Hearing Examiner noted that more than one witness stated that the level of air pollution in the Shenandoah National Park, which is on the western boundary of Fluvanna County, is ranked among the worst in the country. Report at 27.

incremental increases in the overall level of pollution, the current system does not prevent significant deterioration, but, instead, merely delays it.[20]

Comments relative to the Hearing Examiner's findings and recommendations with respect to the Facility's impact on air quality were addressed primarily by the DEQ, the Applicant, and Dynegy.

The DEQ's primary points are: (i) the Hearing Examiner had misinterpreted some of the testimony; (ii) the DEQ conducts detailed multi-source air quality impact analyses for criteria pollutants when there is some indication that increased emissions may have a significant impact on ambient air quality, an approach that is a long-standing policy of the EPA and the Commonwealth's Air Pollution Control Board; and (iii) if the Commission wants more information relating to siting decisions, other forums would be more appropriate than in the context of an individual application.

The DEQ explains that the purpose of an air quality analysis is to determine if the proposed facility or modifications thereto will cause a predicted violation of either the NAAQS or the allowable increments or contribute significantly to a predicted violation. The DEQ states that, initially, the facility is analyzed for its impact on air quality alone. If the predicted maximum concentrations are all less than the significant impact levels, as defined by the EPA for the specific pollutants and their associated averaging periods, it can be deduced that no other analysis is necessary. According to the DEQ, if the predicted maximum concentrations remain under the minimal significance levels using the current conservative modeling techniques, the DEQ would be assured that the plant's impacts on ambient air quality will be insignificant.

The DEQ further states that, on the other hand, if the predicted maximum emissions from the proposed facility exceed the significance levels, a list of background facilities in addition to a

[20] *Id*. at 27-28.

monitored background concentration will be evaluated along with the proposed source. If this analysis predicts violations of the air quality standards, the impacts of the proposed source alone must be compared for the same meteorological condition and receptor to the total concentration to determine if it caused the predicted concentration alone and/or contributed significantly to the violation. If either of these conditions is predicted, then:

> [T]he emissions must be modified in order to not cause a violation or not be significant at the predicted violation before the permit can be issued. On the other hand, if the proposed source does not exceed the significance levels at the predicted violations from the multi-source analysis, then the proposed facility can be permitted and the violations will be resolved in a practically enforceable manner by the DEQ. [21]

With respect to the Hearing Examiner's discussion of the DEQ's air quality analysis review, the DEQ states that the Examiner suggested that the DEQ did not adequately model and consider all air quality impacts. The DEQ responded that it conducts detailed multi-source air quality impact analyses for criteria pollutants when there is some indication that increased emissions may have a significant impact on ambient air quality.

It appears to us that the DEQ thinks the Hearing Examiner simply does not understand the PSD program and how the DEQ administers it. We find, to the contrary, that the DEQ's own description of its review process shows that the Hearing Examiner understood very well how the process works. For example, there is nothing in the DEQ's comments that disputes or contradicts the Hearing Examiner's observation that the DEQ's initial analysis does not take into account the existing air quality. In fact, the DEQ states that initially a proposed facility is evaluated for its impacts on the air quality "alone."[22]

[21] DEQ Comments at 3.
[22] *Id*. at 2.

The DEQ also addresses the Hearing Examiner's concern that there is no cumulative analysis assessing the impact of a proposed facility along with the impacts of other existing and proposed facilities in nearby areas. The DEQ states that "there is no existing modeling procedure designated the 'cumulative impact' model."[23] We do not dispute the accuracy of the DEQ's s statement, but note that this answer neither denies the veracity of the Examiner's observation nor is responsive to the Hearing Examiner's concern. Finally, the DEQ suggests that the Commission should more appropriately raise the issue of cumulative impacts in another forum. This issue is addressed below.

Tenaska also filed comments responding to the Hearing Examiner's analysis of the environmental impact of the Facility. Though in the context of discussing its proposal to use fuel oil, Tenaska contended that the Commission has no authority under the Code of Virginia to address the impact of air emissions, and any such attempt to do so would usurp the authority of the DEQ to evaluate and determine the impact of the Facility on air emissions.

In its Comments, Dynegy asserts that the Commission's consideration of environmental issues should be based on "responsible environmental stewardship." It contends that the Commission will fulfill that role simply by receiving and giving due consideration to all reports from state agencies that are concerned with the environment. Dynegy states that:

> While the Commission has a statutory charge to *receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection*, to follow the Hearing Examiner's recommendation would chart an unwise course for the Commonwealth. Rather, the best policy for the Commission to follow in fulfilling its responsibilities would be to ascertain that the DEQ has conducted its review and permitting of a proposed project in accordance with all applicable federal and Virginia environmental requirements.[24]

[23] *Id.* We note that the Bonneville Power Administration has recently completed the first phase of a cumulative impact study. *See infra*, nn. 29-30 and related text.
[24] Dynegy Comments at 21-22. (Emphasis in italics in original; emphasis underlined added.)

In short, Dynegy would, in essence, have the Commission's role in considering environmental impacts be limited to making sure that the DEQ did everything it is supposed to do.

As noted above, the Board of Supervisors sent a letter expressing their surprise that the Staff and the Hearing Examiner did not appear to review and take into consideration the several ways that the County has investigated the impact of the Facility on the environment, including air quality assessments. On the contrary, we find no reason to believe that the Hearing Examiner failed to read and consider any of the material submitted in this case.[25]

Proceeding to our analysis of this matter, in addition to the applicable statutes discussed above, the Commission must be guided by the policy set forth in the Constitution of Virginia. Section 1 of Article XI of our Constitution states:

> [I]t shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

We cannot comply with our statutory obligations, implement this constitutional policy, and consider properly the impact of the Tenaska facility on the environment without first addressing the cumulative impact issue. We note that we have a rulemaking pending that addresses proposed filing requirements dealing with cumulative environmental impacts in applications for plant certifications.[26] We cannot, however, wait on the final order in that rulemaking to address this matter. As noted above, eleven applications are now pending and

[25] On June 27, 2001, the DEQ filed the results of its coordinated review that contained information from other agencies and localities, including materials provided by the Board of Supervisors to the DEQ.
[26] Rules for IPP Filing Requirements, *see supra* n. 18.

more are on the way. We must act now.[27] Moreover, the applicable statutes do not provide for, nor allow us, as Dynegy suggests, to delegate our decision to any other agency; nor do they allow us to abrogate our responsibility to decide whether the project should be approved after considering the effect of the facility on the environment. Also, while we appreciate the DEQ's desire to handle the matter in another forum, the issue is before us and we must address it.

The record in this proceeding is inadequate. While the number of proposed generating plants in Virginia and across the country may not be known with precision, these plant proposals are realities that must be faced.[28] There may be disagreements about exactly how many new plants are proposed in the Commonwealth, but the fact is that there are many by everyone's count. While we do not know how many of the proposed facilities ultimately will be constructed, there is no basis in this proceeding to conclude that any of the announced plants will not be completed. We cannot ignore these proposed facilities; they must be addressed in this case.

We are aware of and appreciate the conservative nature of the current DEQ process, but we must not act in ignorance of the cumulative impact that the Tenaska Facility and other plants may have on our environment. As noted in Case No. PUE010313, the Bonneville Power Administration ("BPA")[29] stated the issue well in its protocol for a cumulative impact study:

> Impacts from generation and transmission carry both site specific and cumulative implications. Both must be examined. Single facility impacts to resources like air and water may not be so significant, but when considered together with similar impacts from other plants the cumulative effects may warrant appropriate

[27] Further, the issue of cumulative environmental impacts has been raised in *this case* by public witnesses and the PEC, and discussed by the Hearing Examiner.

[28] We do know, and may take judicial notice of, the number of plant applications pending before us.

[29] The BPA is an agency of the U.S. Department of Energy. It owns and operates 15,000 miles of high-voltage transmission facilities serving substantial portions of the Pacific Northwest, including Washington, Oregon, and Idaho. In addition, BPA markets power produced primarily by federally owned facilities.

> mitigation actions, including the curtailment of site development. For example, the air emissions from one turbine may have slight impacts on an airshed but when combined with the emissions from several plants within the same airshed their cumulative impacts may prove to be considerable.[30]

In a similar vein, a recent Virginia industry-government task force that was formed for the purpose of attracting high-technology businesses to the Commonwealth[31] included the following as one of its recommendations:

> An assessment should be undertaken to examine the impacts on Virginia's existing industries of the pending expansion of the Commonwealth's Ozone Nonattainment Areas. The assessment also needs to include both the impacts on and impacts by the proposed power plant projects, the existing fossil-fueled power plants, fuel-switching options for already installed industrial and commercial facilities, and potential new applications and technologies, such as distributed generation. (Citation omitted.)[32]

This task force, with the assistance of two professors from Virginia Polytechnic Institute and State University, has made a recommendation that makes sense, both scientifically and intuitively.

We find that the Hearing Examiner was correct with the questions he raised concerning the cumulative impact of other proposed plants in combination with the Tenaska Facility.

The Hearing Examiner states that Fluvanna County is in attainment of the NAAQS but that the public does not know where along the continuum of air quality the county falls. The

[30] Regional Air Quality Modeling Protocol, Bonneville Power Administration, March 30, 2001.
[31] *See* Rahman, Saifut, and Bigger, John, "Improving Virginia's Attractiveness for High-Technology Industries," Task Force on Electric Power for Virginia's High Technology Industry, Alexandria Research Institute, Virginia Polytechnic Institute and State University, October 31, 2001 ("Virginia Tech Study").
[32] Virginia Tech Study at 84.

record does not include the current levels of air pollution in areas that might be impacted by the Facility or what these levels might be after the construction of this and other facilities.

The importance of neglecting a cumulative assessment is obvious, especially with the number of generating plant proposals in Virginia in general and Central Virginia in particular. This concern is pointed out by the PEC in its written comments in this case. Simply put, if many plants that test below the significance levels are approved, we may reach nonattainment without ever knowing it was being approached. Our environment and, indeed, our health may be threatened by the cumulative effects of numerous plants, each of which, when reviewed individually, was deemed "insignificant."

We conclude that we must consider the cumulative impacts of other proposed facilities, together with the Tenaska Facility, on the existing air quality in the area that may be impacted by the Facility.[33] This consideration need not track the proposed rules we recently published for consideration and comment. There may be better, easier, and faster ways to get the data upon which to make an assessment. Decisions must be made as to which proposed plants to consider and how a study should be structured and implemented. Our hope is that interested parties, Staff, and the DEQ could work with the Hearing Examiner to help him establish how these issues might be best addressed as promptly as practicable.[34] We do not desire to delay construction, but we must address this important issue and carry out our statutory obligations. We will remand

[33] While our Staff does not have great depth of expertise in this area, we are hopeful that the DEQ will lend its considerable expertise to help review and evaluate studies prepared by or for the Applicant. Further, we may, as we have in the past in similar cases, utilize the assistance of outside consultants.

[34] It may be, depending on the locations of proposed plants, that a number of applicants or developers consider working together to sponsor a single study that might address many cumulative impact issues. We note that the BPA appears to have concluded the first phase of its cumulative impact study in less than six months, and we understand that the study answered many questions. Also, a study examining the potential impact on regional haze of 15 of the more than 40 proposed power projects in the BPA service area has been completed.

the cumulative environmental impact issues to the Hearing Examiner. We expect the record to be developed so that he can make meaningful recommendations to us on these important issues.

We understand that the DEQ must operate within what it considers to be its parameters. We appreciate the invaluable assistance we receive from the DEQ, the Department of Game and Inland Fisheries, the Department of Conservation and Recreation, the Department of Historic Resources, and the other state agencies that provide their expert analysis in our hearings. Our decision as to whether approval should be granted to construct a facility, however, must be based upon more than a checklist of required studies. As we have discussed, we are required to make an independent decision.

Economic Development

Pursuant to § 56-46.1 of the Code, we may consider the effect of the facility on economic development; § 56-596 A requires that we take into consideration the goal of the advancement of economic development in the Commonwealth. This area also concerns us.

The deterioration of air quality may have a corresponding negative repercussion upon economic development. Perhaps an important impact would be that poor air quality would hinder the attraction of new jobs to an area. This would be especially true in rural areas where quality of life attributes include clean air.

A more critical impact upon economic development occurs when an area reaches nonattainment levels. In such situations, there could be a potential moratorium on new industry or significant cost increases for a major new business. If we consider the atmosphere solely from the perspective of whether new industry can economically locate in Virginia, the issues may be similar to those we must consider in evaluating only the environmental impact. At some point, nonattainment is reached and then, if significant new industry is not altogether prohibited, off-

sets might be required to build a new facility. Such off-sets may mean the plant locates elsewhere. Certainly, this must have been at least part of the reason the Virginia Tech Study called for an assessment of the possible expansion of the Commonwealth's Ozone Nonattainment Areas, including the impact of proposed power plant projects. The last approved plant may put us over the edge such that neither a generating facility nor an industrial site may be economically developed in Virginia. A decision to approve a generating plant that creates 50 jobs could preclude a manufacturing plant from being constructed that would create 1,000 jobs.

The environment and economic development are inextricably intertwined. If we proceed in ignorance and pollution exceeds acceptable levels, our environment and our health will suffer and so too will our economy. If the environment deteriorates, plants and facilities will locate elsewhere because of a decrease in our quality of life and because of the added expense of off-sets and similar difficulties of locating new facilities in an area with poor environmental quality. In the long run, we can never have a healthy economy without a healthy environment.

In evaluating a proposed plant and associated facilities, the Commission must have data available that will enable it to gauge potential impact on the environment and economic development. The Hearing Examiner should consider economic development as part of his review on remand.

The Public Interest

One of the Hearing Examiner's primary concerns about the Facility was Tenaska's proposal to use low sulfur fuel oil as an alternative fuel during six months of the year, for no more than a total of 720 hours per year. The Hearing Examiner noted that one of Tenaska's witnesses stated that the Facility will have on-site storage for 3.6 million gallons of fuel oil, which is an amount sufficient to operate the Facility at 100% capacity for 72 hours during

emergency periods. The Hearing Examiner stated that if the Facility operates the entire maximum allowed amount of time using fuel oil, the Facility would consume 35 million gallons of fuel and would require approximately 4,000 tanker truckloads of fuel oil during the six months it is permitted to use fuel oil. The Examiner noted the public witnesses' concern that, given the likelihood of increased truck traffic if the use of fuel oil is approved, there may be an increase in the number of serious accidents because the Facility is located on a road that is not even two lanes wide.

Based on the Hearing Examiner's analysis of this issue from the perspective of the public interest, he recommended that Tenaska's request to use low sulfur oil as an alternative fuel, during emergency periods, be denied. He found that the Applicant has not articulated well its need to burn fuel oil in emergencies. He also stated that what constitutes an emergency is not clear. He observed that since the Facility will operate as a base load generator, the entity that will actually sell the plant's output, Tenaska's "tolling partner," should be able to match natural gas fuel deliveries to the Facility's output. Further, the Hearing Examiner queried why Virginians should be exposed to additional air pollution if its use is not essential to the success or failure of the project. He also observed that the Applicant's air modeling analysis fails to consider the impact on air quality of 4,000 diesel tanker trucks in Fluvanna County or any other area in Virginia.

Moreover, the Hearing Examiner stated, merchant plants are popping up in Virginia "faster than dandelions in the springtime,"[35] and the Commission will have the opportunity to

[35] Report at 22.

more closely scrutinize applications for such plants to evaluate which facilities best comport with the public interest. If the Commission approves this Application, Virginia will have to live with that decision for 30 to 50 years. The Examiner added that if the Commonwealth is going to be the epicenter of merchant plant production in the mid-Atlantic region, the State "might as well have the most technologically advanced, least polluting electric generating facilities possible."[36] He concluded that the proposed use of fuel oil is contrary to the public interest and should be prohibited by the Commission.[37]

Tenaska objected to the Hearing Examiner's findings and recommendations on the fuel oil on several grounds. First, Tenaska contended that its inability to use fuel oil as a back-up fuel would impact the reliability of the project should interruptions on the Transco natural gas pipeline occur. As such, adoption of this recommendation could set back the development of merchant plants, which would be contrary to the Commonwealth's stated goal of developing a reliable competitive market for generation. According to Tenaska, prohibiting the use of fuel oil in this case may have a chilling effect on communities' ability to attract merchant plants in rural Virginia. Tenaska asserts that a prohibition on using fuel oil would place a burden on the Facility that no other generators in Virginia bear, placing the Facility at a competitive disadvantage.

Moreover, Tenaska argues, there is no empirical support or record evidence to support the Examiner's findings and recommendations regarding the use of fuel oil. It contends that the Hearing Examiner ignored record evidence indicating that the use of low sulfur fuel oil would have an insignificant impact on air quality. Tenaska emphasized that the air quality modeling analysis it conducted, which was approved by the DEQ, showed that the Facility's impact on air

[36] *Id.*
[37] *Id.* at 32.

quality would be below the significance levels. Tenaska comments that the Hearing Examiner failed to mention that the ultra-low sulfur fuel oil it has proposed to use is the next cleanest fuel, and it has not yet become commercially available. Tenaska states that the proposed use of fuel oil serves the public interest in that it will ensure reliable service while protecting the environment. It further states that there is no record evidence upon which to determine the amount of, or potential disruption by, potential truck traffic due to the Facility's operation.

Finally, Tenaska asserts that the Hearing Examiner's rationale for prohibiting the use of fuel oil usurps the authority of the DEQ, the State agency with the authority to implement the regulations and policies of the State Air Pollution Control Board. Tenaska states that the Commission has deferred to the expertise of the DEQ in assessing the environmental impacts of a proposed generating facility pursuant to Code § 56-46.1 and an interagency agreement ("Agreement") between the Commission and the Secretary of Natural Resources.[38]

Dynegy also opposes the Hearing Examiner's recommendation that the Applicant's proposed use of fuel oil as an alternative fuel be denied. Dynegy argued that the proposed use of fuel oil is an issue that should be left to VDOT and local authorities. Dynegy takes issue with the Hearing Examiner's statement that the air quality analysis is flawed because it does not

[38] Tenaska Comments at 25. The Agreement, dated August 4, 1992, is Attachment 2 to Tenaska's Comments. Contrary to Tenaska's assertion, the Agreement does not provide that the Commission should "defer" to the DEQ. It provides that the Commission will advise and consult with the Secretary of Natural Resources on issues that will affect the environment in Virginia, and the Commission and the Secretary "shall endeavor to cooperate on such environmental issues." Cooperating and consulting with the DEQ does not equate to never questioning the DEQ or always agreeing with the DEQ. While the Commission greatly appreciates the effort and expertise of the DEQ, we are required to make an independent decision with respect to the impact of the Facility on the environment. In doing so, we are to "receive and give consideration to all reports that relate to the proposed facility by state agencies concerned with environmental protection." Moreover, in several cases, the Commission, pursuant to its statutory obligations, has imposed conditions relating to the environment in addition to conditions imposed by the DEQ. *See, e.g., Application of Appalachian Power Company, For certificates of public convenience and necessity authorizing transmission lines in the Counties of Bland, Botetourt, Craig, Giles, Montgomery, Roanoke and Tazewell: Wyoming-Cloverdale 765 kV Transmission Line and Cloverdale 500 kV Bus Extension*, Case No. PUE970766, Doc. Con. Ctr. No. 010560153 (May 31, 2001).

consider the impact of 4,000 tanker trucks in Fluvanna County; according to Dynegy, such emissions are not covered by the PSD regulations, even in the category of "secondary emissions."[39] In addition, Dynegy states that the Hearing Examiner suggested that the Facility will not use the latest pollution control technology, and responds by stating that federal and Virginia PSD regulations require a rigorous analysis of control options so that the best available control technology is identified and required for the project.[40]

Limitations on the use of fuel oil or prohibiting its usage may, with a proper record and analysis, be a condition imposed under the statutes as desirable or necessary to minimize adverse environmental impacts or as a consideration under the public interest standard. In this case, it appears that the Hearing Examiner may not have considered all aspects of this matter in reaching his recommendation. Accordingly, we remand this issue to the Examiner to develop the record more fully, reconsider the matter, and make a recommendation to us.

With respect to the Hearing Examiner's findings and recommendations that relate to water supply, Tenaska's position appears to be that the Commission should not be concerned about the Company's proposals when deliveries of water from the James River may be curtailed or interrupted. It said that: "This Commission need not deal with possible sources of auxiliary water supply in the proceeding."[41] We disagree. The statutes do not simply refer to the Facility but to "associated facilities" as well. The facilities related to water supplies are certainly included. Further, water is an important natural resource, and we should and must consider the impact the Facility will have on water supplies in the Commonwealth as part of our environmental consideration. It is appropriate for these matters to be considered in this

[39] Dynegy Comments at 27-28.
[40] *Id*. at 28.
[41] Tenaska Comments at 28.

proceeding. At the same time, we recognize that it may not be possible to address all contingencies for a plant that may operate for decades. We remand this matter also to the Hearing Examiner to develop the record concerning back-up or alternative sources of water at times of drought and low flow, and to recommend whether any conditions are needed in this area. Any such proposed condition must be drafted carefully so as to achieve a proper balance of protection of our resources and flexibility to allow a proposed plant to operate in a reasonable and prudent manner.

With respect to the emergency response issue and Tenaska's emergency management plan, the Hearing Examiner discussed concerns voiced by several public witnesses who testified that the County's emergency management personnel, volunteer firefighters, and rescue squad may not be sufficiently well equipped and trained to respond adequately to the kind and size of emergencies that could occur at a large gas-fired generator such as the proposed Facility. The Examiner recommended that two conditions be included in any certificate that is approved by the Commission. First, he would require that the plan include procedures for contacting off-duty plant personnel to assist with emergencies at the Facility. Second, the Examiner would require the Company to conduct, at least annually and at its own expense, an emergency response training exercise that would focus on "real world" emergencies.

Tenaska objects to the Hearing Examiner's two recommended conditions. The Applicant contends that adoption of the Examiner's recommendation would usurp the Board of Supervisors' authority for addressing emergency response issues in the County. The Applicant also asserts that the Board of Supervisors has adequately addressed the issue of emergency responses in the SUP; further, the Facility will have an integrated contingency plan that will incorporate various statutory and regulatory requirements regarding emergency responses.

We believe that addressing safety concerns related to the Facility, especially the establishment of an emergency management plan, is critical to evaluating the Facility as part of our consideration of the public interest. Given the concerns expressed by the public witnesses and the lack of information in the record about the facts behind these concerns, we find that the record appears to be incomplete and does not provide a basis upon which to make an informed decision. Accordingly, we will ask the Hearing Examiner, as part of his remand, to more fully develop the record on this matter and reconsider his findings and recommendations concerning this issue.

Finally, the Hearing Examiner recommended that Tenaska be required to consult with the Virginia Department of Forestry ("DOF") and the Virginia Department of Game and Inland Fisheries ("DGIF") to develop a forestry management plan that will provide for the gradual thinning of the pine trees and their replacement with a more biodiverse stand of trees. The Examiner also recommended that we should prohibit clear-cutting of the buffer area. We find that the Company should be required to consult with and abide by, to the extent practicable, the recommendations of the DGIF and DOF to develop and maintain a long term, effective buffer. While we certainly would expect development of a biodiverse stand of trees would be part of the plan and that clear-cutting would be avoided, we should not impose these limits. The plans must be developed by the experts and implemented over time.

Accordingly, IT IS ORDERED THAT this matter is remanded to the Hearing Examiner for further proceedings and recommendations as set forth herein.